

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
2000 Biennial Regulatory Review)	CC Docket No. 00-175
Separate Affiliate Requirements of Section)	
64.1903 of the Commission's Rules)	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

I. INTRODUCTION

Pursuant to the Federal Communications Commission's (Commission) Notice of Proposed Rulemaking (*NPRM*)¹ the United States Telecom Association (USTA)² respectfully addresses the issues raised in the *NPRM* in the above-referenced docket and requests that the Commission eliminate § 64.1903 of its rules.

After the enactment of the Telecommunications Act of 1996, and against USTA's urgings, the Commission adopted § 64.1903. According to the rules developed by the Commission, Independent ILECs must use a separate corporate affiliate to provide in-region, interexchange service, in whole or in part, on a facilities basis.³ Independent

¹ *In re 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Dkt. No. 00-175, Notice of Proposed Rulemaking, FCC 01-261 (Adopted, Sept. 13, 2001; released, Sept. 14, 2001); 66 Fed. Reg. at 50,139-50,140 (Oct. 2, 2001).

² USTA is the nation's oldest trade organization representing the local exchange carrier industry. USTA represents over 800 domestic telecommunications companies that provide a full array of voice, data and video services over wireline and wireless networks; most of which are independent incumbent local exchange carriers (Independent ILECs).

After the Commission issued its Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-149, where the Commission imposed these structural requirements on Independent ILECs, USTA petitioned the Commission for reconsideration of the order, and its decision to impose the structural separation requirement. "Petition for Reconsideration United States Telephone Association" in CC Dkt. No. 96-149 (Aug. 4, 1997).

³ See *in re Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Dkt. No. 96-149 and *Policy and Rules Concerning the*

ILECs that provide in-region, interexchange service exclusively through resale may do so through a separate corporate division subject to certain safeguards.⁴

The Commission said in 1997 that it would revisit this issue in three years.⁵ We find ourselves at the end of the three-year period. The harm to IXC's that the Commission envisioned and that prompted the adoption of § 64.1903, never materialized. USTA submits that the perceived dangers never existed. Accordingly, the Commission should now eliminate § 64.1903.

II. DISCUSSION

A. Separate Long-Distance Subsidiaries Are Not Necessary and The Commission Should Eliminate § 64.1903 of its Rules.

Three years after the Commission imposed the separate subsidiary requirement for facilities-based Independent ILECs and the corporate division requirement for those Independent ILECs that are reselling long-distance services, there is still no credible evidence of the speculative harm used by the Commission to justify the adoption and the continued enforcement of § 64.1903. This rule is a perfect example of the type of prophylactic rule that Chairman Michael Powell has indicated the Commission ought to

Interstate, Interexchange Marketplace; CC Dkt. No. 96-61, *Local Rural Telephone Cooperative, Inc. Petition for Waiver*, CC Dkt. Nos. 96-149, 96-61, Second Order on Reconsideration and Memorandum Opinion and Order, FCC 99-103 (rel., Jun. 30, 1999)(Second Order on Reconsideration) at ¶ 9 and Appendix A at § 64.19093(b).

⁴ Second Order On Reconsideration at §§ 9, 22, 25 and Appendix A at § 64.19092(b)(1).

⁵ Second Report and Order at ¶ 196: "We intend to commence a proceeding three years from the date of adoption of this Order to determine whether the emergence of competition in the local exchange and exchange access marketplace justifies removal of the Fifth Report and Order requirements [citation omitted] We believe that three years should be a reasonable period of time in which to evaluate whether effective competition has developed sufficiently to reduce or eliminate an independent LEC's bottleneck control of exchange and exchange access facilities." *Id.*

cease imposing.⁶ Given the ongoing feedback and state oversight of Independent ILEC exchange access and local service rates, there is no realistic way in which Independent ILECs can leverage their perceived dominance in the local exchange market to their advantage in the inter-exchange market. USTA continues to believe that the Commission's analysis as to market power, when applied to telecommunications carriers that meet the U.S. Small Business Administration's definition of "small business",⁷ is economically flawed and legally unsustainable.

Each of the major facilities-based IXC operates a local exchange service division or subsidiary. Each has the option to displace any Independent ILEC as the end user customers' local exchange and exchange access service providers. This fact alone undercuts the argument that IXCs can be disadvantaged in the interchange market by Independent ILECs that compete with IXCs for interexchange customers in the local service area of the Independent ILEC. Should, in some limited number of cases, an Independent ILEC inappropriately and unlawfully leverage its position in the interexchange market based on its position in its local exchange service market, IXCs can always seek redress from the FCC through the § 208 complaint process or in court.⁸

Imposition of § 64.1903 threatens to require the inefficient deployment of network facilities, especially in a SoftSwitch environment, if Independent ILECs are prohibited from integrating their local exchange and interexchange networks. Rather than discouraging new investment and facilities deployment because of artificial constraints that are based on speculative harms, the Commission should be reviewing

⁶ Second Order On Reconsideration, Commissioner Powell concurring in part, dissenting in part and issuing a separate statement. *Id.* at Cmr. Powell Statement at 1-3.

⁷ NPRM at ¶¶ 33-34.

impediments to facilities investment and the deployment of redundant networks. It is long past time for the Commission to eliminate § 64.1903. It is not only unnecessary, it is proving to be counter-productive.

The bulk of Independent ILECs offering long-distance services continue to do so through non-facilities-based resale. While not scientific, a survey of USTA Independent ILECs indicates that at least 65 percent of Independent ILECs providing interexchange service within their local exchange service area do so on a pure resale basis.

It remains to be seen if sufficient data will be submitted for the record from which credible conclusions can be drawn as to how many Independent ILECs provide interexchange service in their local exchange service areas and how many of them do so using any of their own facilities. Whatever these data reveal, the fundamental question that still must be answered is whether sufficient evidence exists to allow for the conclusion that IXC's will be harmed in the interexchange market by Independent ILECs providing interexchange service in their local service areas absent § 64.1903. USTA believes that there is no evidence to support the continued imposition of § 64.1903 and the Commission's previous speculative concerns are insufficient to justify § 64.1903 in today's telecommunications market. USTA urges the Commission to eliminate § 64.1903. If harm results from its elimination, that harm can be addressed on an individual-case basis through the § 208 complaint process or through litigation. An entire industry segment though should not be burdened with the requirements imposed by § 64.1903 solely because inappropriate or unlawful conduct could arise in its absence.

⁸ 47 U.S.C. § 208.

III. CONCLUSION

USTA has consistently opposed the Commission's decision to extend the separate subsidiary requirement on Independent ILECs offering interexchange service from their local exchange service areas absent evidence of a harm to be addressed. The Commission adopted § 64.1903. Elimination of § 64.1903 is long overdue. Any harm that may arise from its elimination can be addressed by adjudication processes. USTA, as a part of its Biennial Review filings, has urged the Commission to eliminate Subpart T of Part 64.⁹ Doing so would eliminate § 64.1903. USTA urges the Commission to eliminate Subpart T and § 64.1903 along with it.

Respectfully submitted,

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⁹ "Comments of the United States Telecom Association" *in re Biennial Review 2000* (Oct. 10, 2000) at 29.

CERTIFICATE OF SERVICE

I, Gail Talmadge, do hereby certify that on November 1, 2001, a copy of
Comments of the United States Telecom Association, in CC Docket No. 00-175, was
hand-delivered to the persons listed below.

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